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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DOMONICK GUY, Defendant and Appellant.	B200439 (Los Angeles County Super. Ct. No. BA314623)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Reversed in part and affirmed in part as modified.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, for Plaintiff and Respondent.

Defendant and appellant Domonick Guy appeals from the judgment entered following a jury trial that resulted in his conviction of three counts of petty theft with a prior. He challenges the denial of his motions for new appointed counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) and for self-representation (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)) as untimely. He also contends and the People concede that one of the convictions for petty theft with a prior must be reversed and that defendant's presentence custody credits were miscalculated. We reverse one of the petty theft convictions and modify the judgment to correctly reflect the presentence custody credits to which defendant is entitled; as so modified, we affirm the judgment.

FACTS

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence was undisputed that on December 3, 2006, defendant entered the electronics department of a Sears store, used something sharp to cut three MP3 players out of the locking devices that secured them to a display case, put the MP3 players in his bag and left the store without paying for them. Defendant's actions were captured by a surveillance camera and observed by Sears' loss prevention agents Ricardo Ruiz and David Cervantes, who were watching the camera monitor in a nearby room. As Ruiz and Cervantes approached defendant in order to detain him, defendant ran away. In the foot pursuit that followed, Ruiz eventually took the lead. Ruiz and defendant gave different accounts of how the chase ended. In Ruiz's version, defendant suddenly stopped running, turned around and started walking back towards Ruiz holding a knife and saying "I ain't going to jail;" afraid to get any closer because of the knife, Ruiz told defendant he only wanted the store merchandise back; whereupon, defendant threw the bag with the MP3 players in it at Ruiz, then turned and walked away. In defendant's version, he was not armed and Ruiz and Cervantes simply stopped chasing him after he tossed the bag containing the MP3 players to Ruiz.

Defendant returned to the same Sears store on either December 20th or 22nd, cut several more MP3 players from the display case, put them in his bag and left the store

without paying. Once again, defendant's actions were captured on a surveillance camera and observed by loss prevention agents watching the monitor. Ruiz once again tried but failed to apprehend defendant.

Defendant was finally apprehended when he returned to the same Sears store on December 24th. Defendant denied having a knife; he told the detective who interviewed him that he used the top of a soda can, not a knife, to cut the MP3 players out of the devices that secured them to the display case.

PROCEDURAL BACKGROUND

Defendant was charged by information with a second degree robbery of a Walgreen store employee on November 29, 2007 (count 1); the second degree robberies of Ruiz and Cervantes on December 3rd (counts 2 and 3); and the December 22nd petty theft with a prior of Sears (count 4). Enhancements for weapons use were alleged as to all three robberies; multiple prior conviction enhancements were also alleged (Pen. Code, §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i); 667, subd. (a)(1); 667.5, subd. (b)).[1]

At his arraignment on January 23, 2007, defendant was represented by Deputy Public Defender Ruchi Gupta. When defendant and Gupta appeared at a pretrial conference on April 27th, defendant did not express any dissatisfaction with Gupta's representation. But in a six-page handwritten letter to the trial court dated April 28, 2007 (and post-marked May 5, 2007), defendant stated: "I would like to ask that you please appoint me a 'State appointed Attorney' immediately, or allow Me to [exercise] My rights & go 'Pro Per'. [¶] I know now with complete certainty that I'm currently not receiving effective [assistance of counsel] from [Gupta]."[2] In the letter, defendant complained that Gupta did not keep defendant adequately apprised of what was happening in the case; had not given defendant copies of his preliminary hearing

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[1] All undesignated statutory references are to the Penal Code.

[2] The post-mark date of the letter is important in light of the then pending trial date of May 7th.

transcript as requested; and had failed to file pretrial motions to dismiss count 1 (the Walgreens robbery) because of a faulty witness identification and counts 2 and 3 based on Ruiz's and Cervantes' allegedly inconsistent preliminary hearing testimony. Regarding counts 2 and 3, defendant wrote: "David Cervantes is the only one who came to Prelim & told the truth when he testified He never saw me pull out a knife, Neither did I threaten him in any way. [¶] . . . I don't deserve to be treated like this, Neither have I done anything more than swipe a couple of MP3's." The letter concludes: "I realize that my letter contains an admission of guilt to one theft charge of Dec. 2nd 06 of Sears. [¶] I also realized that this is not a formal request in the form of a 995 motion. However if that's what it takes to allow you to review My case then I would like to request Pro Per status so I can be given access to all relevant materials to be able to thoroughly give you the proper paper work the Court requires. However, I'd prefer a State appointed Attorney. Someone who [will] work with Me, & not against Me."

When defendant appeared for jury trial with Gupta on May 7th, the trial court apparently had not received defendant's letter and defendant did not verbally alert the trial court to his dissatisfaction with Gupta. The matter was trailed to May 14th.

On May 11th, Gupta filed a section 995 motion to dismiss the weapon enhancement as to the Cervantes robbery. Defendant was present in court on May 14th when the motion was granted and the matter transferred for trial assignment. There was no indication in the record that the trial court had received defendant's letter and, once again, defendant did not bring his complaints about Gupta to the court's attention.

On May 15th, defendant rejected the People's plea offer, and a jury was impaneled. Once again, there is no indication that the trial court had received defendant's letter and defendant did not bring his grievances against Gupta to the attention of the court.

On May 16th, before the evidentiary portion of defendant's trial commenced, the People dismissed count 1 (the Walgreen's robbery) because the victim told the prosecutor that he was no longer sure of his identification. The jury began deliberating at 3:30 p.m. that day. Although the trial court had apparently yet to receive defendant's letter, some

time that day the bailiff communicated to the trial court that defendant was requesting to speak directly to the court; the trial court denied the request.

After the lunch recess the next day, May 17th, while the jury was deliberating, the trial court engaged in the following colloquy with defendant and defense counsel: "THE COURT: . . . [D]o you want to make a record about something? [¶] THE DEFENDANT: Yeah, I wanted to go on the record about, I would like to take the time to read this.[3] It is my grievance, basically I want to have a *Marsden* hearing. [¶] THE COURT: Well, it is too late for *Marsden*. We're in the middle of trial. I can't give you a *Marsden* in the middle of trial. We were in trial yesterday. We also selected the jury. [¶] [DEFENSE COUNSEL]: For the record, Your Honor, this is the first I have heard of the *Marsden* hearing. [¶] I was informed yesterday by the bailiff that my client wanted to have some type of talk with the court. I was under the impression it had been conveyed to the court and a decision had been made. [¶] THE COURT: It had. The bailiff said to me, he wants to talk to you. And I said I wasn't going to talk to him. [¶] THE DEFENDANT: I asked for a chamber hearing. I also mentioned to her when she finally came to see me that morning. [¶] Did she relate to you that I wanted to have a chamber hearing after or before the lunch break? I communicated the same thing when she came back to talk to me, I wanted a chamber hearing. [¶] THE COURT: Well, no, the only contact I had on any ["]chamber["] hearing, was the contact I described where the bailiff came in the morning, the defendant wants to talk to you. I said I am not going to talk to him. Tell the defendant I am not going to talk to him. That was the end of it as far as I am concerned. [¶] [Defendant], it would be way untimely to try to raise a *Marsden* motion in the middle of trial. [¶] THE DEFENDANT: I would like to go on record to say that I object to these proceedings until my grievances are heard. [¶] THE COURT: That is fine. Your objection is noted and overruled. We'll wait to see what the jury does with the case. [¶] I thought [defense counsel] did a fine job representing you."

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3 Presumably, "this" is defendant's letter to the court. Although the letter is file stamped May 17, 2007, there is no indication that the trial judge ever read it.

Later that afternoon, the jury acquitted defendant of the Ruiz and Cervantes robberies, but found him guilty of the lesser included offense of crime of petty theft with a prior as to both; it was unable to reach a unanimous verdict on the weapon enhancement as to Ruiz; the jury also found defendant guilty of the petty theft with a prior as to Sears. Following a bifurcated nonjury trial on the prior enhancements, defendant was sentenced to 14 years and 4 months in prison, comprised 6 years on count 2 (the three year high term doubled pursuant to the Three Strikes Law), plus 1 year and 4 months on count 4 (the mid-term doubled pursuant to section 667, subdivision (b)); plus 7 years (one year for each of seven priors) pursuant to section 667.5, subdivision (b); sentence on count 3 (the Cervantes petty theft) was stayed pursuant to section 654.

Defendant filed a timely notice of appeal.

DISCUSSION

1. *Defendant's* Marsden *Motion Was Timely*

Defendant contends the judgment must be reversed because the trial court improperly denied his *Marsden* motion as untimely. We conclude that, although the trial court erred in not hearing defendant's motion on May 17th, defendant suffered no prejudice.

Under the Sixth Amendment right to assistance of counsel, a defendant is entitled to substitute one appointed counsel for another if the record clearly shows that the defendant and appointed counsel " ' " 'have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " ' " (*People v. Welch* (1999) 20 Cal.4th 701, 728.) " 'A criminal defendant is entitled to raise his or her dissatisfaction with counsel at any point in the trial when it becomes clear that the defendant's right to effective legal representation has been compromised by a deteriorating attorney-client relationship.' [Citation.] 'It is well settled that a criminal defendant, at any stage of the trial, must be given the opportunity to state reasons for a request for new counsel.' [Citation.]" (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814 (*Lopez*).)

In *Lopez*, the defendant made three unsuccessful pretrial *Marsden* motions, all having to do with a conflict arising out of the office of the public defender representing various witnesses in the defendant's case. Each time, the trial court found no conflict. (*Lopez, supra*, 168 Cal.App.4th at pp. 809-810.) When the defendant made a fourth *Marsden* motion on the same grounds during trial, the trial court denied it as "untimely." (*Id*. at pp. 812-813.) The appellate court found this to be error, reasoning that while a midtrial *Marsden* motion can be denied if the change would disrupt the orderly process of justice, the trial court must nevertheless give the defendant an opportunity to have his reasons for seeking new counsel heard. (*Id*. at pp. 814-815; see also *People v. Clark* (1992) 3 Cal.4th 41, 104 [trial court's refusal to listen to defendant's reasons for requesting substitution cannot support exercise of discretion]; *People v. Carr* (1972) 8 Cal.3d 287, 299 [denial of midtrial *Marsden* motion not an abuse of discretion where trial court asked for defendant's reasons]; *People v. Vera* (2004) 122 Cal.App.4th 970, 980.)

Ruling on a *Marsden* motion is ordinarily reviewed under the deferential abuse of discretion standard. To compel reversal where the error is a refusal to comply with *Marsden* by giving the defendant an opportunity to be heard, the defendant must show that a more favorable result was probable absent the error. For example, in *People v. Washington* (1994) 27 Cal.App.4th 940, 943 (*Washington*), the court concluded that the failure to consider a *Marsden* motion made at the sentencing hearing was harmless where the defendant did not show that he would have obtained a more favorable result had the motion been entertained.

Here, the trial court denied defendant's *Marsden* motion after expressly refusing to hear his reasons for wanting to substitute counsel. Although defendant's letter setting forth his reasons for wanting to substitute counsel was filed that same day, there is no indication the trial judge ever read the letter. Thus, it appears that the trial court failed to give defendant an opportunity to be heard – a violation of the principals set forth in *Marsden*. But defendant has failed to make the requisite showing of prejudice; i.e. that he would have obtained a more favorable result had the motion been entertained. The

main source of his grievance against Gupta as set forth in his letter to the trial court was that Gupta had not filed motions to dismiss the charges relating to the Walgreens robbery and the use of a dangerous weapon. But by the time defendant made his oral motion on May 17th, the Walgreen's robbery charge and the weapon enhancement as to the Cervantes robbery had been dismissed and the jury ultimately was unable to reach a unanimous verdict on the weapon enhancement as to Ruiz. Moreover, defendant admitted in his letter and at trial that he took the MP3 players from Sears, denying only that he threatened Ruiz with a knife. The jury was apparently persuaded, since they acquitted defendant of robbery and convicted him only of the lesser included theft offenses. Under these circumstances, defendant has failed to show a reasonable probability that he would have achieved a more favorable result had the trial court heard his *Marsden* motion.

2. *Defendant Did Not Make An Unequivocal* Faretta *Motion*

Defendant contends the judgment must be reversed because the trial court failed to consider his *Faretta* motion.

Under *Faretta, supra*, 422 U.S. 806, if a defendant makes a timely, unequivocal request to represent himself, that request must be granted so long as the defendant is competent to make that choice. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1363 (*Bradford*); *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048.) When a *Faretta* motion is not made in a timely manner before trial, self-representation is no longer a matter of right but is subject to the trial court's discretion. (*Bradford, supra*, at p. 1365.) In determining whether a request was equivocal or not, we examine all the circumstances, drawing every reasonable inference against a waiver of the right to counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087; *People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*).) If the motion was made in passing anger or frustration, was ambivalent, or was brought to delay trial, it may be denied. (*Marshall, supra*, at p. 23.)

Here, it is clear that defendant's true goal was not to exercise his right to self-representation, but to obtain new appointed counsel. Thus, defendant did not make an

unequivocal *Faretta* motion, and the trial court properly treated it only as a *Marsden* motion. (*People v. Tena* (2007) 156 Cal.App.4th 598, 607-609; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1204.)

3. *The Cervantes Petty Theft Was Necessarily Included in the Ruiz Petty Theft*

Defendant contends, and the People concede, that the judgment on count 3 must be reversed because both petty thefts arose from a single incident. We agree.

Multiple counts of violating a statute are appropriate " 'only where the actus reus prohibited by the statute – the gravamen of the offense – has been committed more than once.' " (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1162 (*Garcia*).) " '[A] defendant may properly be convicted of multiple counts for multiple victims of a single act only where the act prohibited by the statute is centrally an "act of violence against the person." [Citation.]' [Citation.]" (*Id*. at p. 1163.) *Garcia* is instructive. In *Garcia*, the defendant was charged with three counts of evading a police officer arising out of a police pursuit involving the defendant and three police vehicles. The trial court denied his motion to dismiss two of the three counts. He was convicted of all three counts and sentenced on one; sentence on the other two counts was stayed. (*Id*. at p. 1162.) On appeal, the defendant challenged the trial court's denial of his motion to dismiss. (*Id*. at p. 1162.) The appellate court reversed the conviction on two of the three counts. It reasoned that the defendant could only be convicted of one count even though the pursuit involved multiple police officers in multiple vehicles because the "evading was an uninterrupted single course of conduct, i.e., one continuous act of driving lasting 30 minutes." (*Id*. at p. 1163.)

Here, defendant was charged with robbery of both Ruiz and Cervantes. Because robbery is a violent crime, defendant could have properly been convicted and sentenced on both counts. But he was not convicted of robbery. As to both counts, he was convicted of the lesser offense of petty theft with a prior in violation of section 666. Section 666 does not proscribe an act of violence against the person. Accordingly, under the reasoning of the court in *Garcia*, defendant could not be convicted of two counts of

violation of section 666 arising out of a single incident simply because two people – in this case two store employees – were in possession of the stolen property. The trial court should have dismissed one of the counts.

4. *The Trial Court Miscalculated Defendant's Presentence Custody Credits*

Defendant contends and the People agree that the trial court miscalculated defendant's presentence custody credits because it did not calculate those credits according to section 4019. We agree and order the judgment modified accordingly.

DISPOSITION

The conviction for petty theft with a prior on count 3 is reversed; the judgment is modified to reflect presentence custody credits of 241 days comprised of 161 days of actual time plus 80 days of good conduct credit. As so modified, the judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment and transmit it to the Department of Corrections.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

BIGELOW, J.